

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

ERDIST MITCHELL, JR.,

Plaintiff,

CASE NO. 1:08-CV-143

v.

HON. ROBERT J. JONKER

BRETT BARBIER, DONNA FRITZ,  
G. SMITHSON, MARK MALONE,  
and SHIRLEE HARRY, et. al.,

Defendants.

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**ORDER APPROVING REPORT AND RECOMMENDATION**

The Court has reviewed the Magistrate Judge's Report and Recommendation (docket # 49) filed on January 14, 2009. Defendants Barbier, Fritz, Smithson, and Harry filed an Objection to the Report and Recommendation (docket #51) on January 23, 2009.<sup>1</sup>

Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

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<sup>1</sup> Defendant Malone was dismissed from this action on February 24, 2009. (Docket #53.)

FED. R. CIV. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1)(C). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

The Report and Recommendation recommends that Defendants' Motion to Dismiss and/or for Summary Judgment (docket #30) be granted. The Report and Recommendation concludes that Defendants are entitled to summary judgment on the merits. Defendants do not object to this recommendation, but they do object to the Report and Recommendation insofar as it rejects Defendants' claim that Plaintiff failed to exhaust his administrative remedies as a matter of law. Plaintiff has not filed any objections to the Report and Recommendation.

After a de novo review of the record, the Court agrees with Magistrate Judge Brenneman that Defendants are entitled to summary judgment. The Report and Recommendation recommends dismissal on the merits of all of Plaintiff's claims. Plaintiff has failed to timely object to the Report and Recommendation, thus any objections are now waived. *See Willis v. Sullivan*, 931 F.2d 390, 401 (6th Cir. 1991); *see also* 28 U.S.C. § 636(b)(1)(C). Although Defendants object to the Report and Recommendation's ruling on exhaustion, they do not object to the recommended dismissal on the merits. Accordingly, it is not necessary to address exhaustion. *Cf. Fitzgerald v. Corrections Corp. of America*, 403 F.3d 1134, 1139-40 (10th Cir. 2005) ("Under certain circumstances, a district court may, notwithstanding failure to exhaust, proceed to the merits of the claim and dismiss with prejudice if it concludes a party would be unsuccessful even absent the exhaustion issue."). Regardless of whether Plaintiff properly exhausted his grievances, Defendants are entitled to judgment as a matter of law, and the case must be dismissed.

**ACCORDINGLY, IT IS ORDERED** that the Report and Recommendation of the Magistrate Judge, filed January 14, 2009, is approved and adopted as the opinion of the Court.

**IT IS FURTHER ORDERED** that Defendants' Motion to Dismiss and/or for Summary Judgment (docket #30) is **GRANTED**.

Dated: March 4, 2009

/s/ Robert J. Jonker  
ROBERT J. JONKER  
UNITED STATES DISTRICT JUDGE